SERVED: April 24, 2007

NTSB Order No. EA-5282

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 23rd day of April, 2007

MARION C. BLAKEY, Administrator, Federal Aviation Administration, Complainant, v. STEPHEN HAMRICK, Respondent.	)	Docket SE-17967

OPINION AND ORDER

Respondent, proceeding pro se, appeals the oral decision of Administrative Law Judge William R. Mullins, served in this emergency revocation proceeding on March 19, 2007.[1] By that

[1] A copy of the transcript containing the law judge's order is attached.

decision, the law judge dismissed respondent's appeal to the Board of the Administrator's emergency revocation order, which revoked respondent's mechanic certificate. We deny respondent's appeal.

The Administrator's emergency revocation order, dated February 16, 2007, alleged that respondent was not qualified to hold a mechanic certificate with airframe and powerplant ratings, based on respondent's "refusal to submit" a urine specimen, pursuant to 14 C.F.R. part 121, App. I, §§ II, III[2] and 49 C.F.R. § 40.191(a)(2).[3] The Administrator's order, which also

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[2] Title 14 C.F.R. part 121, App. I, § II defines "refusal to submit" as follows: "*Refusal to submit* means that an employee engages in conduct including but not limited to that described in 49 C.F.R. 40.191." Section III provides that, "[e]ach employee … who performs a safety-sensitive function listed in this section directly or by contract … for an employer as defined in this appendix must be subject to drug testing under an antidrug program implemented in accordance with this appendix."

[3] Title 49 C.F.R. § 40.191(a)(2) provides as follows:

> **§ 40.191 What is a refusal to take a DOT drug test, and what are the consequences?**
>
> (a) As an employee, you have refused to take a drug test if you:
> * * * * *
> (2) *Fail to remain at the testing site until the testing process is complete; Provided*, That an employee who leaves the testing site before the testing process commences (see § 40.63(c)) for a pre-employment test is not deemed to have refused to test[.]

now serves as her complaint, asserted that revocation was the appropriate sanction for respondent's alleged refusal, pursuant to 14 C.F.R. § 65.23(b).[4] The Administrator's complaint also alleged that respondent's prospective employer ordered him to take a pre-employment drug test, and that respondent attempted to provide a sufficient amount of urine, but did not provide the requisite amount of 45 milliliters. Compl. at ¶ 9. The complaint also alleged that respondent did not remain at the testing site until the testing process concluded, and therefore "refused" to take the drug test under 49 C.F.R. § 40.191(a)(2) and 14 C.F.R. part 121, App. I. Compl. at ¶¶ 10-11. As such, the Administrator contends that revocation of respondent's certificate is the appropriate sanction. Id. at ¶¶ 12-13. In respondent's answer to the complaint[5] and in his response to the

[4] Title 14 C.F.R. § 65.23(b) provides as follows:

> **§ 65.23 Refusal to submit to a drug or alcohol test.**
>
> * * * * *
>
> (b) Refusal by the holder of a certificate issued under this part to take a drug test required under the provisions of appendix I to part 121 … is grounds for—
>
> (1) Denial of an application for any certificate or rating issued under this part for a period of up to 1 year after the date of such refusal; and
>
> (2) Suspension or revocation of any certificate or rating issued under this part.

[5] Respondent filled out NTSB Form 2005.1 as his answer to the Administrator's complaint, and submitted it after the deadline. Respondent wrote, "N/A" in all three spaces, which asked for:

Administrator's request for admission,[6] respondent appears to have stipulated to the accuracy of all material facts that the complaint alleges.

Respondent appealed the Administrator's order, and the case proceeded to hearing before the law judge on March 19, 2007. Prior to the hearing, the Administrator had filed a motion for summary judgment, alleging that a hearing was not necessary for the disposition of this case, because no genuine issues of material fact necessitated a hearing. The law judge, nevertheless, held a very brief hearing, at which he determined that respondent did not present any genuine issues of material fact; as a result, the law judge granted the Administrator's motion for summary judgment and ordered revocation of respondent's certificate.

On appeal, respondent essentially argues that the sanction of revocation was inappropriate. Respondent's cursory appeal brief acknowledges that respondent arrived at the drug testing

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(..continued)
(1) the paragraph numbers of the allegations that he admitted;
(2) the paragraph numbers of the allegations that he denied; and
(3) other matters or facts that provide an explanation regarding any other circumstances that respondent "wants the NTSB Judge to consider." Administrator's Mot. for Summ. J., Attach. B.

[6] Administrator's Mot. for Summ. J., Attach. C. We discuss respondent's responses to the Administrator's request for admission below.

facility, and "was on a limited schedule" because he needed to pick up his son from school. Respondent's Appeal Br. at 1. Respondent argues that he did not realize the consequences of leaving the testing facility prior to completing the drug test, and thought he could return to finish the test at a later date. Id. Respondent also admits that he "made a grave mistake by regulations." Id. A reasonable interpretation of respondent's brief indicates that respondent does not deny the Administrator's allegations, but merely contests the appropriateness of the sanction. In response to respondent's brief, the Administrator argues that the law judge's finding that revocation was appropriate was proper, based on respondent's admissions and Safety Board precedent establishing that revocation is the appropriate sanction for failure to provide a urine specimen.

Safety Board regulations allow a party to file a motion for summary judgment on the basis that the pleadings and other supporting documentation establish that no material factual issues exist, and that the party is entitled to judgment as a matter of law. 49 C.F.R. § 821.17(d). We have previously considered the Federal Rules of Civil Procedure to be instructive in determining whether disposition of a case via summary judgment is appropriate. Administrator v. Doll,

7 NTSB 1294, 1297 n.14 (1991) (citing Fed. R. Civ. P. 56(e)). In this regard, we recognize that Federal courts have granted summary judgment when no genuine issue of material fact exists. Celotex Corp. v. Catrett, 477 U.S. 317, 322-24 (1986).[7]

We agree with the law judge that, based on the evidence in the record and on respondent's failure to contest the material facts that the Administrator alleged, summary judgment with regard to the factual allegations was appropriate. In response to the Administrator's request for admission, the only alleged fact that respondent denied was the fact that respondent's prospective employer, STS Services, Inc., scheduled his appointment for the pre-employment drug test. Administrator's Mot. for Summ. J., Attach. C at ¶ 2. Respondent admitted that he: attempted to provide a urine specimen on October 25, 2006; left the testing facility even though he did not produce a sample of 45 milliliters; and received notification from the collector at the testing facility that leaving the collection site would constitute a refusal to submit to the test. Id. at ¶¶ 4-7. Given these admissions, respondent's denial of the Administrator's allegation that STS Services, Inc. had scheduled

[7] An issue is *genuine* if the evidence is sufficient for a reasonable fact-finder to return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255-56 (1986). A fact at issue is *material* when it is relevant or necessary to the ultimate conclusion of the case. Id. at 248.

his test is immaterial. Regardless of who scheduled the drug test at issue, respondent does not contest the Administrator's allegations that he left the testing site without having provided a complete urine specimen. As such, no factual issue requiring resolution remains.

In light of our determination that no genuine issue of material fact exists, and that respondent departed from the collection site without completing the drug test, we find that Safety Board precedent requires revocation of respondent's certificate. Governing regulations provide that leaving a drug testing collection site without providing a complete sample constitutes a refusal to submit to a drug test. 49 C.F.R. § 40.191(a)(2). In addition, Board precedent provides that "refusal to be tested warrants revocation." Administrator v. King, NTSB Order No. EA-4997 at 3 (2002) (citing Administrator v. Krumpter, NTSB Order No. EA-4724 (1998)). In King, we acknowledged that revocation may seem to be a harsh sanction for cases in which the Administrator had not established any illicit drug usage or intentional attempts to avoid a drug test. Id. However, as we stated in King, a respondent's "failure to provide a sufficient urine specimen may reflect an effort to evade a positive drug test result," and, therefore, revocation is the necessary sanction. Id. Hence, we agree with the law

judge's granting of the Administrator's motion for summary judgment with regard to the facts of the case and the necessary sanction, because the result is consistent with Safety Board precedent.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and

2. The order of the law judge denying respondent's appeal is affirmed.

ROSENKER, Chairman, SUMWALT, Vice Chairman, and HIGGINS and CHEALANDER, Members of the Board, concurred in the above opinion and order. HERSMAN, Member, did not concur, and submitted the following dissenting statement.

Member Hersman, Dissenting

Although I have a healthy respect for the laws and regulations designed to detect and control the use of illicit drugs and alcohol by transportation employees in safety sensitive jobs, I still find the outcome of this particular case unsettling. Without question, these laws should be interpreted so that there are no loopholes, no skewed applications that wind up favoring offenders. This does not mean, however, that prosecutors, judges, and appeals boards are required to blind themselves to any and all mitigating factors in any one case, to the point that a "clean" employee who undergoes drug testing faces the same level of risk of getting caught in the dragnet as those employees with something to hide.

In this case, Mr. Hamrick was asked to take a pre-employment drug test in anticipation of beginning his new job the following week. Within a time span of a few days, he was free to choose the day and time for his test. The Administrator argued that this very fact proves that Mr. Hamrick caused the test to result in a "refusal" because he controlled his predicament. I think that logic is flawed. While Mr. Hamrick was in control of the

time he allotted himself to complete the test, which turned out to be too little, he likely had no control over his shy bladder, therefore, he did not control his predicament. To use the Administrator's logic, this case demonstrates that Mr. Hamrick's license was revoked because he was a poor time manager. I cannot help but think that anyone who has reviewed this case has at one time or another found himself or herself trying to accomplish a particular task that took longer than expected. Situations like that may lead to frustration and disruption, but how often do they lead to a loss of necessary credentials to pursue a career and a means of support?

Contrary to the Administrator's reasoning, I think that the fact that Mr. Hamrick chose the date and time for his drug test is a strong indication that he had nothing to hide. If he did, he would have chosen a later date or time when his indiscretion would be less apparent. This circumstance is critically distinguishable from King[8] cited in the Board's opinion. In that case, the respondent was taking a random test for which he had no choice of day or time. After the drug test was terminated due to shy bladder syndrome, that respondent was allowed a subsequent medical evaluation to determine if there was any medical reason for the phenomenon. No such courtesy was extended to Mr. Hamrick. When Mr. Hamrick was informed the specimen he provided was not a sufficient amount for testing and no further urine was produced, he stated that he was leaving the testing facility due to a prior obligation to pick up his son from school. Although Mr. Hamrick was informed that his leaving the testing facility would be recorded as a "refusal to test," it is not clear if he understood, or was ever informed, that a "refusal to test" was the equivalent of losing his certificate and his livelihood.

According to the Administrator's brief, a person undergoing a drug test is allowed to drink up to 40 oz of fluids after the test has begun. The Administrator's brief states that Mr. Hamrick had water available to him but chose to leave the testing site instead of waiting for a full bladder. However, in the hearing, Mr. Hamrick stated that he had "three small cups of water," that the water was kept locked in a cabinet, and that he was told that he would not be allowed any more than the three cups. There is no way to tell from the record how much water was contained in those three small cups, but assuming a cup

[8] Administrator v. King, NTSB Order No. EA-4997 (2002)

holds eight ounces, three cups would total only 24 ounces, far below the allowed 40 ounces. It is unfortunate that this circumstance was not further explored during the hearing, because it possibly could have formed a stronger basis for Mr. Hamrick to appeal the judge's decision.

In making his bench decision, the Law Judge compared the circumstances of this case to an earlier case, Administrator v. Pittman, NTSB Order No. EA-4678 (1998). The Administrator also cited the case in her reply brief to Mr. Hamrick's appeal. In that case, the respondent had submitted to a reasonable suspicion alcohol test, and then removed the test form from a computer printer at the testing facility, turned off the computer, and left the facility. At Mr. Hamrick's hearing, the Law Judge seemed to say that he felt compelled to rule in favor of revocation because of the outcome of Pittman in which he held in favor of the respondent, but was overturned by the Safety Board. Apparently, the Law Judge had another case in mind because Pittman was heard by another Law Judge who did not rule in favor of the respondent, so it is impossible to tell from the record exactly why he believed the earlier case tied his hands in deciding this case.

If Mr. Hamrick has a record of drug or alcohol abuse, or even has been suspected of such, the outcome of this case is entirely appropriate. The record in this case presents no information about Mr. Hamrick's past, however, and the Board must base its judgment only on the thin set of facts presented. From what I have read, it seems to me that the outcome of this case was unduly harsh. The regulations give the Administrator the option of suspending Mr. Hamrick's certificate, but she chose revocation without clear explanation. The case law cited in the Administrator's brief and in the Board's opinion does not convince me that in this narrow set of circumstances, no one in the administrative process can consider any mitigating factors.

Preserving the integrity of the laws that protect our transportation system from impaired workers is a most worthy goal. However, without any information that would indicate Mr. Hamrick is a danger in that way, one must question whether the integrity of the laws would have suffered if the administrative process had considered all of the factors that led him to discontinue his drug test.